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SUPREME COURT, U.S.

No. 79-5010

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

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ALPHONSE BIFULCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (Pet. App. IV, 1-8) is reported at 600 F.2d 407.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 1979. The petition for a writ of certiorari was filed on July 3, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

21 U.S.C. 841(b)(1)(B) provides in pertinent part:

> In the case of a controlled substance in Schedule I or II which is not a narcotic drug or in the case of any controlled substance in Schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000 or both. * * * Any sentence imposing a term of imprisonment, under this paragraph, shall, in the absence of a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

21 U.S.C. 846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

QUESTION PRESENTED

Whether a special parole term may be imposed as part of the sentence for conspiracy to distribute a controlled substance under 21 U.S.C. 846.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on one count of conspiracy to manufacture, distribute, and possess with intent to distribute phencyclidine, a Schedule III controlled substance, in violation of 21 U.S.C. 846.[1/] Petitioner was sentenced to four years' imprisonment to be followed by a five-year term of special parole, and a $1,000 fine. The court of appeals affirmed by judgment order (Pet. App. I).

Petitioner thereafter filed a pro se motion to vacate his sentence under 28 U.S.C. 2255, claiming that the sentence was unlawful because a term of special parole may not be imposed under 21 U.S.C. 846. The motion was denied by the district court (Pet. App. III), and the court of appeals affirmed (Pet. App. IV).

DISCUSSION

The issue presented in this pro se petition (Pet. 2-3) is of substantial importance to the administration of criminal justice because of the significant role of the special parole term in the rehabilitation of drug offenders and because of the large

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1/ Petitioner was acquitted on two other counts charging him with substantive violations of 21 U.S.C. 841(a)(1) (Pet. App. IV, 2).

number of drug conspiracy offenders who have been given special parole terms during the decade that the Comprehensive Drug Abuse Prevention and Control Act has been in effect. The courts of appeals are divided over whether a conspiracy conviction can constitute a predicate for imposition of a special parole term. Although we believe that this issue was correctly decided against petitioner, we do not oppose his petition for a writ of certiorari in light of the conflict among the courts of appeals.

1. Of the six circuits that have addressed this issue, five have held that a sentence imposed under Section 846 for drug conspiracy must include a special parole term whenever such a term would be mandated for commission of the underlying substantive offense. In addition to the Second Circuit's decision in this case, the Fourth, Fifth, Eighth, and Tenth Circuits have upheld the imposition of special parole terms for drug conspiracy offenses. See United States v. Sellers, No. 79-1107, slip op. 11-14 (8th Cir. Aug. 7, 1979); Cantu v. United States, 598 F.2d 471, 472 (5th Cir. 1979); United States v. Burman, 584 F.2d 1354, 1357-1358 (4th Cir. 1978); United States v. Jacobson, 578 F.2d 863, 867-868 (10th Cir.), cert. denied, 439 U.S. 932 (1978); see also United States v. Dankert, 507 F.2d 190, 191 (5th Cir. 1975) (sustaining imposition of a special parole term under the drug importation conspiracy statute 21 U.S.C. 963, which contains language identical to that in Section 846).[2/]

2/ In Timmreck v. United States, 577 F.2d 372 (6th Cir. 1978), reversed on other grounds, No. 78-744 (May 4, 1979) the Sixth Circuit assumed that it was necessary to add a term of special parole to a sentence of imprisonment for a drug conspiracy conviction under Section 846. 577 F.2d at 373. In reversing that court's holding that failure to inform the defendant about the mandatory special parole term upon accepting his plea of guilty to the conspiracy offense justified collateral relief under 28 U.S.C. 2255, this Court also assumed that special parole was "required by the applicable statute." United States v. Timmreck, supra, slip op. 2 & n.2. Special parole terms have regularly been upheld, albeit without specific consideration of this issue, in connection with drug conspiracy convictions in other cases as well. See e.g., United States v. Moreno, 569 F.2d 1049 (9th Cir.
(Footnote continued)

The Third Circuit stands alone in holding that a special parole term may not be imposed as a penalty for a drug conspiracy offense. United States v. Mearns, 599 F.2d 1296 (3d Cir. 1979). The court reasoned that Section 846 provides that conspiracy is punishable "by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the * * * conspiracy"; that "imprisonment or fine" does not include a special parole term; and that therefore no special parole term may be imposed under Section 846. Accord, United States v. Jacquinto, 464 F. Supp. 728, 729 (E.D. Pa. 1979); Fassette v. United States, 444 F. Supp. 1254, 1247-1248 (C.D. Cal. 1978).

2. We submit that the court of appeals in this case was correct in concluding that the Comprehensive Drug Abuse Prevention and Control Act contemplates imposition of a special parole term upon conviction for a drug conspiracy offense whenever such a term is mandated for the substantive offense, and that the contrary holding of the Third Circuit in Mearns was erroneous. The very structure of the Act evidences a plain purpose on the part of Congress to make the penalties for conspiracy co-terminous with those for substantive offenses. Congress created a single conspiracy provision and incorporated by reference therein various sentencing provisions set out in the sections of the Act that define substantive offenses (21 U.S.C. 841-845). No effort was made to reiterate the resultant complex penalty structure in the conspiracy section itself, and thus little can be inferred from the failure of Section 846 to reflect the full range of sentences that may be imposed under the Act.

(continuation of footnote)
1978); 434 U.S. 940 (1977); United States v. De La Fuente, 550 F.2d 309 (5th Cir. 1977); United States v. Armedo-Sarmiento, 545 F.2d 785, 794-795 (2d Cir. 1976), cert. denied, 430 U.S. 817 (1977); United States v. Wiley, 519 F.2d 1348 (2d Cir. 1975); United States v. Rich, 518 F.2d 980, 986-987 (8th Cir. 1975), cert. denied, 427 U.S. 907 (1976).

In any event, it does not seem proper that persons convicted of drug conspiracy offenses in some circuits should be subject to mandatory special parole terms, while those convicted of the same offense in another circuit are not. Accordingly, we believe that the conflict among the circuits on this issue is one that should be resolved by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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